IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 46 OF 2004

Aspaq N. Ahmed,
Presently lodged in
Central Jail, Aguada,
Sinquerim, Bardez, Goa. ... Appellant

versus

State of Goa,
Through P.I. Uday Naik,
Anti Narcotic Cell Police
Station, Panaji, Gao. ... Respondent

Mr. J. P. D'Souza, Advocate for the Appellant.

Mr. S. N. Sardessai, Public Prosecutor for the Respondent.

CORAM : N. A. BRITTO, J.

DATE : 22ND SEPTEMBER,2005.

ORAL JUDGMENT

The appellant herein is accused who has been convicted and sentenced by the learned Special Judge, Mapusa in Special Criminal Case No.9/2003 under Section 20(b)(ii)(C) of the Anti Narcotic Drugs aand Psychotropic Substances Act, 1985

to undergo R.I. for a term of 10 years and to pay a fine of Rs.1,00,000/- in default to undergo R.I. for 1 year. The accused has challenged the said conviction and sentence imposed upon him in the present appeal.

2. The case of the prosecution is that on 18-1-2003 at about 15.00 hours, P.I. Uday Naik of ANC Police Station, Panaji, got reliable and specific information that a person of certain description would come to deliver a consignment of charas to his customers near Hotel Green Park, Guirim, Mapusa, between 18.00-18.30 hours which information P.I. Uday Naik/P.W.4 reduced into writing and submitted a copy thereof to Dy.S.P. D'Souza/P.W.5 through the P.I. of ANC Police Station Shri Vincent Paes/PW6 and thereafter he secured the presence of two panchas, namely, Gangadhar Halankar/PW3 and Vijay Surlakar and informed them about the receipt of the said information and after introducing the panchas to the raiding party they left to the said Hotel Green Park at Guirim along with the seal of the said Police Station as well as the weighing kit box and other required material including a typewriter and reached there about 17.10 hours and concealed their presence.

3. At about 18.15 hours, they saw one person who came from Guirim side towards Hotel Green Park with a shoulder bag on his left shoulder whose description tallied with the description earlier received and all of them thereafter surrounded the said person who is none other than the accused, identified themselves and also obtained the identity of the accused and then P.I. Uday Naik/PW4 told the accused about the receipt of the said information and about his wanting to take a personal search of the said shoulder bag carried by him with charas and prior to that P.I. Uday Naik/PW4 introduced the raiding party members including the panchas to the accused and also told him that he had a right to be searched before a Gazetted Officer or a Magistrate of his choice which offer the accused declined. At that time, the accused was wearing a black colour T-shirt and a black colour pant and the accused on being told to hand over the shoulder bag of black in blue colour, the accused handed over the same and in the said bag there were 6 in number, rectangular substances wrapped individually in transparent polythene bags in the form of slabs which had additional transparent polythene wrappings to each of the said slabs which after opening the inner wrapper were found to be

blackish in colour and upon smell PW4/P.I. Uday Naik told the members of the raiding party that the said substances were suspected to be charas and they were collectively weighed and found to be 3.07 kgs. which were then put in an envelope, packed and sealed with 7 seals of the Anti Narcotic Cell Police Station and was signed by P.W.4/P.I. Uday Naik, the panchas as well as the accused to be sent for chemical analysis. A personal search of the accused was taken and 2 notes of Rs.100/- each were found in the left side pant pocket which were also put in an envelope, packed and sealed. The accused was informed that possession of charas was an offence and when the accused was asked to produce legal document the accused could not produce the same. PW4/P.I. Uday Naik then told the panchas that the value of the said suspected charas was Rs.3,07,000/- approximately. The panchanama was drawn and a seizure report was prepared. PW4/P.I. Uday Naik also prepared a letter addressed to the Director of Food & Drugs Administration with specimen seal impression on it and submitted the same through P.I. Paes/PW6 and then PW4/P.I. Uday Naik prepared 2 more letters, one handing over the seal to Dy.S.P. D'Souza/PW5 and the other addressed to Shri Paes/PW6 for handing over the

muddemal for safe custody and to register the same in the muddemal register. At about 00.15 hours of 19-1-2003, P.I. Uday Naik/PW4 returned to the Police Station and recorded the complaint and registered the offence against the accused. PW6/P.I. Paes received the letter from P.I. Uday Naik/PW4 handing over the 3 sealed envelopes and he entered the same on the muddemal register of the Police Station under entry No.1/2003 and kept the same under his exclusive custody and on 20-1-2003 PW6/P.I. Paes deputed LHC 3050 to the Office of CID Crime Branch, Panaji along with the sealed envelope marked Exh.1 along with a forwarding letter addressed to S.P. Crime Branch and a letter to the Director of Food & Drugs Administration, Panaji, for chemical analysis. On the same day, PW2/Sushant Naik received the letter addressed to the Superintendent of Police as well as the letter addressed to the Director of Food & Drugs Administration, Panaji, in duplicate along with big size green colour envelope stated to be 3.07 kgs. of charas and personally handed over the said sealed envelope-Exh.1 with the forwarding letter and the forwarding note in duplicate, to the Director of Food & Drugs Administration on the same day. The Junior Scientific Officer Shri Mahesh

Kaissare/PW1 who was at the relevant time working as a Chemist found that Exh.1 which was received in the laboratory on 20-1-2003 had seals intact individually covered and tallied with the specimen seal impression sent separately. He analysed the contents of Exh.1 on 3-3-2003 and found the weight of the substances without wrappings to be 3.015 kgs. and on analysis he confirmed that the said substance contained charas.

4. On a charge-sheet filed by P.I. Uday Naik/PW4 the accused came to be charged, tried, convicted and sentenced, as aforesaid.

5. The case of the prosecution was that the panchanama and seizure report were prepared in the presence of Gangadhar Halankar/PW3 and Vijay Surlakar but the latter was not examined by the prosecution. Undisputedly, the said Vijay Surlakar was a witness who had acted as a panch witness in 16 cases of ANC Police Station in the year 2002. This fact has been admitted by PW4/P.I. Uday Naik. It is also come on record that PW3/Gangadhar Halankar had also acted as a panch witness in 2 earlier cases and on 7-1-2003 though he was called at the Police

Station there was no raid conducted. On 18-1-2003, PW3/Gangadhar Halankar acted as a panch witness on the third occasion.

6. PW3/Gangadhar Halankar in his evidence before the Court stated that on 18-1-2003 while he was in his Office in the Directorate of Land Survey, Panaji, he was called by one Constable of ANC Police Station and, therefore, he went to the ANC Police Station at about 16.00 hours and met P.I. U.B. Naik and at that time there was another person with P.I. Naik by name Vijay when he was told by P.I. Uday Naik/PW4 that he had received a specific and reliable information about a person of given description would be coming with a consignment of charas. PW3/Gangadhar Halankar in his cross-examination specifically denied the suggestion that he had falsely stated that he was called by one Constable from the Office of Directorate of Land Survey, Panaji, on 18-1-2003 to act as a panch witness. PW3/Gangadhar Halankar conceded that on that day, he had not received any written instructions to act as a panch witness and in further cross-examination, he stated that he did not know the Constable who had come to call him on that day but at the

relevant time he was working as a Field Surveyor in the said Office and his Office was in the same complex as the ANC Police Station. Again, PW3/Gangadhar Halankar affirmed that the said Constable approached him while he was in the Office sitting with other staff and that he was on duty on the said day being a working day. Again, he categorically denied that 18-1-2003 was not a working day.

7. The defence in the course of cross-examination of P.I.Uday Naik/PW4 was able to establish that 18-1-2003 was a Saturday and it was otherwise admitted by PW3/Gangadhar Halankar that his working days were from Monday to Friday, Saturday and Sunday being holidays.

8. In the above background, Mr. J. P. D'Souza, the learned Counsel appearing on behalf of the accused submits that Gangadhar Halankar/PW3 could not have been called from his Office being a holiday and, therefore, could not have been present at the time of the raid. Mr. D'Souza, the learned Counsel has further submitted that the presence of PW3/Gangadhar Halankar, at the time of search and seizure, has

been doubted by the learned Special Judge but she has proceeded to convict the accused on the basis of the evidence of P.I. Uday Naik/PW4 and other Police witnesses. Mr. D'Souza, has submitted that the prosecution did not choose to re-examine PW3/Gangadhar Halankar to explain the fact that he could not have been called from Office because it was a Saturday and, therefore, a holiday nor examined Constable Bhuimber, who according to P.I. Uday Naik/PW4 was sent to call PW3/Gangadhar Halankar from his Office nor make an entry in the Station diary about deputing the said Constable Bhuimber to call PW3/Gangadhar Halankar when on an earlier occasion on 7-1-2003 a Station diary was indeed made, as admitted by PW4/P.I. Uday Naik about the sending of the Constable to call PW3/Gangadhar Halankar. Mr. D'Souza, therefore, submits that these facts as well as the cross-examination of PW3/Gangadhar Halankar show that he was not present at the time of search and seizure and, therefore, it casts a serious doubt not only regarding the presence of PW3/Gangadhar Halankar at the scene but also as regards the credibility of the other witnesses who have stated that PW3/Gangadhar Halankar was present at the time of search and seizure. Mr. D'Souza further submits that

inspite of knowing that PW3/Gangadhar Halankar had committed a grave mistake in his deposition that he was called from his Office, when he could not have been so called, the prosecution chose not to examine the other panch witness, namely, the said Vijay Surlakar.

DATE: 29TH SEPTEMBER,2005.

9. On the other hand, Mr. S. N. Sardessai, the learned Public Prosecutor appearing on behalf of the State submits that the presence of PW3/Gangadhar Halankar cannot be doubted because he signed the panchanama and the seizure report which otherwise would have not been possible to be signed in case he was not present. Mr. Sardessai, the learned Public Prosecutor further submits that it was also the duty of the accused to have told the Court, when the accused was questioned regarding the facts stated by PW3/Gangadhar Halankar that PW3/Gangadhar Halankar was not present. Mr. Sardessai further submits that even if the evidence of PW3/Gangadhar Halankar is kept aside then still a conviction could be based on the evidence of the two Police Inspectors, namely, PW4/P.I. Uday Naik and PW6/P.I.

Vincy Paes and the Dy.S.P., namely, PW5/Finton D'Souza. In support of his submission, Mr. Sardessai, has placed reliance on the case of **Gurcharan Singh alias Channi and another** v. **The State**(1993 Cri.L.J. 1622) wherein the Delhi High Court has stated that in the matters of appreciation of evidence statements of Police Officers as witnesses are entitled to the same weight as the statements of a member of public, but it must inspire confidence to be relied upon. Mr. Sardessai has also relied on the case of **Ishwari** v. **State** (1980 Cri. L.J. 571) in support of his submission that only because a person appeared as a witness for prosecution in two other earlier cases his evidence need not be discarded on that ground. Mr. Sardessai has also relied on the case of **Girdhari Lal Gupta and another** v. **D. N. Mehta and another**(AIR 1971 SC 28) in support of his submission that the Police Officers could be believed and a conviction recorded on the basis of their evidence. Indeed, the Supreme Court in the aforesaid case has stated that there is no general rule that the evidence of an Investigation Officer cannot be relied upon unless it is corroborated and the question would depend on facts of each case. Mr. Sardessai has also relied on the case of **Badri and others** v. **The State**(1996 Cri. L.J. 1928) to support his

submission that in case the presence of a witness at the scene of occurrence is found trustworthy, the fact that there were certain falsehood or embellishment or improvements here and there in his testimony is no ground to discredit him.

10. The learned Special Judge, as can be seen from the Judgment, has rightly doubted the presence of PW3/Gangadhar Halankar at the time of search and seizure of the accused but has proceeded to place reliance on the evidence of PW4/P.I. Uday Naik and other Police witnesses and convicted the accused by relying on the case of **P. P. Fatima** v. **State of Kerala**(2003 (8) SCC 726). In the said case, it was contended that since the panch witness to the seizure had not supported the prosecution case, the seizure could not be accepted and the Supreme Court held that the mere fact that the panch witness does not support the prosecution case by itself would not make the prosecution case any less acceptable, if otherwise the Court is satisfied from the material on record and from the evidence of the seizing authority that such seizure was genuinely made. In my view, the evidence of PW3/Gangadhar Halankar and PW4/P.I. Uday Naik who are the main witnesses of the prosecution does not at all inspire confidence and,

therefore, the accused certainly deserves to be given benefit of doubt. Here is a case where PW3/Gangadhar Halankar has supported the case of prosecution but his presence itself at the scene is not free from doubt, as his cross-examination shows.

11. I have already referred to the evidence of PW3/Gangadhar Halankar to some extent. PW3/Gangadhar Halankar apart from the fact that he stated that he was on duty in his Office on that day being a working day, further first stated that he had acted as a panch witness in one case and then stated that he acted as a panch witness in two cases prior to this. He denied the suggestion that he had acted as a panch witness in at least 6 more cases. I have already stated that this was in fact the third occasion that PW3/Gangadhar Halankar acted as a panch for ANC Police Station. PW3/Gangadhar Halankar admitted that he knew PW4/P.I. Uday Naik as a volley ball player like himself and both were members of Mala Sports Club, about 20 years back. But when PW4/P.I. Uday Naik was asked about the same, PW4/P.I.Uday Naik stated that he did not recall if he knew PW3/Gangadhar Halankar prior to this raid but he had acted as a panch witness at his instance in another case. To a specific question that he knew PW3/Gangadhar Halankar prior to this raid and otherwise than as a panch witness, PW4/P.I. Uday Naik replied that he did not remember about the

same. PW4/P.I. Uday Naik appeared to be reluctant in disclosing his connection with PW3/Gangadhar Halankar. As rightly pointed out on behalf of the accused by Mr. D'Souza, 18-1-2003 being a Saturday, PW3/Gangadhar Halankar could not have been called from his Office for it was a Saturday and a holiday and likewise PW4/P. I. Uday Naik could not have sent Constable Vishal Bhuimber(P.C. Buckle No.4683) to the Office of the Directorate of Land Survey to call PW3/Gangadhar Halankar, for the said raid and it is but obvious that both PW3/Gangadhar Halankar and PW4/P.I. Uday Naik have not told the truth regarding the very vital aspect of the case. Both the said witnesses have made false statements namely, when PW3/Gangadhar Halankar stated that he was called from his Office and when PW4/P.I.Uday Naik stated that he had sent a Constable to the Office of PW3/Gangadhar Halankar to call him, both not knowing the fact that 18-1-2003 was a holiday and their false statements could have been exposed. If on 17-1-2003 a station diary was made that PW3/Gangadhar Halankar had reported to ANC Police Station when he was called, there is no reason why there was no station diary made on 18-1-2003 when PW3/Gangadhar Halankar was called to the Police Station. Constable Vishal Bhuimber was also not examined. The evidence of both the said witnesses namely, PW3/Gangadhar Halankar and PW4/P.I. Uday Naik that PW3/Gangadhar Halankar was called from Office are obviously false

statements and the very genesis of the case of the prosecution does not inspire confidence. The version of PW3/Gangadhar Halankar that he was called from the Office and was a member of the raiding party, therefore, is not free from doubt and likewise, the version of PW4/P.I. Uday Naik that PW3/Gangadhar Halankar was called from his Office and was present at the time of search and seizure. The fact that the panchanama and the seizure report was signed by panchas is no guarantee that the panchas were really present at the scene. Such signatures can always be obtained from pliable panch witnesses and since PW3/Gangadhar Halankar was called for the fourth time to act as a panch witness and has not stood the test of cross-examination on vital aspect of the case, the evidence of PW3/Gangadhar Halankar has got to be rejected as not inspiring confidence to corroborate the evidence of PW4/P.I. Uday Naik and the other two witnesses who are all Police Officers. It was not necessary for the accused to have told the Court that PW3/Gangadhar Halankar was not present at the time of search, as contended. The accused has stated, when examined under Section 313, that what PW3/Gangadhar Halankar stated was false and that explanation was more than sufficient which the accused was called upon to give in the circumstances of the case. Corroboration is a rule of prudence. As already stated, PW3/Gangadhar Halankar was a person who was well known to PW4/P.I. Uday Naik as stated by the former and was called to act as a

panch witness for the fourth time and he has not at all stood the test of cross-examination, therefore, it is a matter of doubt whether he was at all present at the time of search and seizure and it is quite probable that he has deposed to favour the version of PW4/P.I. Uday Naik as he was well known to him prior to this incident. Once, the evidence of PW3/Gangadhar Halankar is discarded as not inspiring confidence what remains is the evidence of PW4/P.I. Uday Naik which also does not inspire confidence for the same reasons as stated in the case of PW3/Gangadhar Halankar.

12. Inspite of having issued a letter dated 7-1-2003 to the Directorate of Land Survey to send two Government employees to serve as panchas there is no reason why PW4/P.I. Uday Naik had to instruct the Constable to bring one Government employee and one person from the city area. When questioned on this aspect, PW4/P.I. Uday Naik stated that he did not ask for the second panch to be a Government employee since one Government employee was being secured to stand as a panch and he felt that it was not necessary that a second panch should also be a Government employee. If, the Chief Secretary had issued a circular to the Directorate of Land Survey requiring the assistance of the Government servants to serve as panch witnesses during the raid and if a general letter dated 7-1-2003 was sent to the said Department to depute two Government employees there is

no reason why PW4/P.I. Uday Naik had to instruct Constable Vishal Bhuimber only to get one Government employee and the other person from city area the latter having turned out to be a person who stood as a witness 16 times. It appears that PW4/P.I. Uday Naik was only interested in getting pliable persons to witness the search and seizure.

13. Once, it is held that the presence of PW3/Gangadhar Halankar was doubtful at the time of search and seizure, the evidence of PW4/P.I. Uday Naik remains without being corroborated and the evidence of PW3/Gangadhar Halankar also makes a dent into the credibility of the version of PW4/P.I. Uday Naik. Corroboration by independent evidence is not a rule of law but one of caution and prudence. It gives an assurance whether the version given by the Police Officers is true or not. This is not the case where a panch witness has turned out to be hostile to the case of prosecution and the evidence of PW4/P.I. Uday Naik inspires confidence. In fact, it does not. It appears that PW4/P.I. Uday Naik was only interested in securing only pliable witnesses to witness the search and seizure. In the light of that, this is a fit case where accused deserves to be given benefit of doubt in the absence of reliable independent corroboration to the evidence of the Police witnesses. On facts, the ratio of the case of **P.P. Fatima** v.

State of Kerala(supra) was clearly inapplicable to the facts of the case. Hence, the Order.

The appeal is allowed. The impugned Judgment/Order of the learned Special Judge, Mapusa, in Special Criminal Case No.9/2003 is hereby set aside. The accused shall stand acquitted under Sections 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 and shall be set to liberty forthwith unless he is required in any other case.

N. A. BRITTO, J.

RD.